

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BAYLOR UNIVERSITY MEDICAL  
CENTER**

**Respondent,**

Case 16-CA-195335

**and**

**DORA S. CAMACHO, an individual.**

**Charging Party.**

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**RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
DECISION AND ARGUMENT IN SUPPORT OF EXCEPTIONS**

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Respectfully submitted,

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## **INTRODUCTION**

Respondent Baylor University Medical Center (the “Company,” “BUMC,” or “Respondent”) respectfully submits its exceptions and argument in support pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board (the “Board”) to the Decision of Administrative Law Judge (the “ALJ”) Robert A. Ringler issued on February 12, 2018 and the related proceedings.

## **EXCEPTIONS**

### **Exception #1**

The ALJ’s finding that Charging Party’s name is Doris Camacho (ALJ Dec. p. 1, Line 40), as this finding is not supported by the record. Charging Party’s name is Dora Camacho. Tr. 31:13-16.

### **Exception #2**

The ALJ’s finding that Camacho’s “firing was not alleged to be unlawful” (ALJ Dec. p. 1, Line 40, n. 2), as this finding is not supported by the record. Camacho filed a Charge on March 3, 2017 (Case No. 16-CA-194387) alleging that she was terminated after making a complaint to the Company’s Ethics Hotline. GC Ex. 1(g) at Exhibit D. On April 27, 2017, Acting Regional Director Timothy Watson dismissed Camacho’s Charge on the grounds that “there [was] insufficient evidence to establish a violation of the Act.” GC Ex. 1(g) at Exhibit E. Camacho did not appeal.

### **Exception #3**

The ALJ’s finding that the Company offered Camacho a “Confidential Settlement Agreement and General Release” (ALJ Dec. p. 1, Line 44), as this finding is not supported by the record. The document offered by BUMC to Camacho was a Confidential Separation Agreement and General Release (“Separation Agreement”). GC Ex. 2.

#### **Exception #4**

The ALJ's failure to evaluate and analyze the alleged unlawful provisions in the Separation Agreement in their entirety (ALJ Dec. p. 2, Lines 7-26), as this failure contributed to the ALJ's incorrect conclusion that the No Participation in Claims and Confidentiality provisions are unlawful. It is well-established that when determining whether a rule violates Section 8(a)(1) of the Act, the rule must be read and analyzed in its entirety. *See, e.g., Dish Network, LLC*, 365 NLRB No. 47 (Apr. 13, 2017) ("Additionally, in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, and particular phrases may not be read in isolation.") (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). The ALJ's decision to selectively quote from the alleged unlawful provisions (ALJ Dec. p. 2, Lines 7-26) and his failure to analyze the provisions in their entirety resulted in the erroneous conclusion that the No Participation in Claims and Confidentiality provisions violate Section 8(a)(1) of the Act.

#### **Exception #5**

The ALJ's findings that "Baylor entered into 26 equivalent Separation Agreements with other workers," that "[t]hese agreements contained analogous No Participation in Claims, Confidentiality and Non-Disparagement Clauses," and that the agreements were "essentially equivalent" (ALJ Dec. p. 2, Lines 30-32, p. 2, Line 32 n. 4), as these findings mischaracterize the provisions contained in the Workforce Realignment Agreement and General Releases offered to other employees and are not supported by the record.

A comparison of the Separation Agreement offered to Camacho (GC Ex. 2) and the Workforce Realignment Agreement and General Releases offered to other Baylor employees (GC Ex. 3) reveals that the agreements have significant and substantive differences. Specifically, the No Participation in Claims provision in a portion of the Workforce Realignment Agreement

and General Releases contains the following language: “However, I understand that this Agreement is not intended to and will not interfere with my right to file a charge with EEOC or freely participate in an EEOC investigation or proceeding, without need for a court order or pre-notification to BSWH,” (GC Ex. 3 at Camacho\_BUMC – Subpoena 000193, 000204, 000215, 000226, 000238, 000250, 000262, 000274), whereas Camacho’s Separation Agreement does not contain such language. GC Ex. 2.

Additionally, the Confidentiality provision in Camacho’s Separation Agreement contains the following language: “CAMACHO may disclose that the terms of her separation from BSWH are part of a mutually satisfactory agreement which is covered by a confidentiality clause, and, therefore she is not at liberty to discuss the terms of her agreement or her separation,” (GC Ex. 2), whereas a majority of the Workforce Realignment Agreement and General Releases do not. GC Ex. 3 at Camacho\_BUMC – Subpoena 000016, 000026, 000037, 000048, 000071, 000082, 000093, 000104, 000114, 000125, 000136, 000147, 000158, 000168, 000179, 000190, 000201, 000212, 000223, 000235, 000547, 000259, 000271, 000283. Accordingly, the ALJ’s conclusions are not supported by the evidence.

**Exception #6**

The ALJ’s consideration of the 26 Workforce Realignment Agreement and General Releases (GC Ex. 3) in his factual findings, legal analysis, and remedy (ALJ Dec. p. 2, Lines 28-32, n. 4, p. 5, Lines 1-21, n. 8), as these Agreements were not properly authenticated at the hearing and should not have been admitted into evidence.

The General Counsel failed to authenticate 23 of the 26 Workforce Realignment Agreement and General Releases that were admitted into evidence. Tr. 63:9-65:6; *see Washington Fruit & Produce Co.*, 343 NLRB 1215, 1241 (2004) (“Fed. R. Evid. 901 requires

that evidence be authenticated as a condition precedent to admissibility.”); Fed. R. Evid. 901 (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”); 29 U.S.C. Section 160(b) (unfair labor practice proceedings “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .”). At the ULP Hearing, BUMC employee Lisa Smith was only able to properly authenticate three of the 26 Agreements. Tr. 39:2-5; 42:5-9. The custodian of records for BUMC was present per the General Counsel’s subpoena, but the General Counsel failed to call her to authenticate the remaining 23 Agreements. Tr. 64:7-17. These improperly authenticated Agreements contributed to the ALJ’s incorrect factual and legal findings.

#### **Exception #7**

The ALJ’s findings that the No Participation in Claims provision was unlawful, invalid, and violated the Act (ALJ Dec. p. 2, Line 36, p. 3, Line 33, p. 4, Line 7, p. 5, Lines 4-6), as these findings are not supported by the record or applicable Board precedent.

In analyzing whether the No Participation in Claims provision was lawful, the ALJ was required to balance the nature and extent of the potential impact on NLRA rights and BUMC’s legitimate justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154, slip op. at 3 (December 14, 2017). At the hearing, the General Counsel presented no evidence regarding the potential impact the No Participation in Claims provision would have on employees’ NLRA rights. Tr. 5:1-87:20. Accordingly, the ALJ erred in finding that the No Participation in Claims provision violated the Act.

### **Exception #8**

The ALJ's finding that the No Participation in Claims provision "falls under *Boeing* Category 3, inasmuch as the adverse impact on core NLRA-protected rights is not outweighed by the rule's justification" (ALJ Dec. p. 3, Lines 33-35), as this finding is not supported by the record or applicable Board precedent.

The ALJ's categorization of the No Participation in Claims provision as a Category 3 is based on his finding that the provision would have an "adverse impact on NLRA-protected rights." ALJ Dec. p. 3, Lines 33-35. At the hearing, the General Counsel presented no evidence regarding the potential impact the No Participation in Claims provision would have on employees' NLRA rights, as neither Camacho nor any former BUMC employee testified regarding the potential impact the provision would have on their NLRA rights. Tr. 5:1-87:20. Moreover, the record established that Camacho never executed the agreement, and was never bound by any of its terms. GC Ex. 2. Accordingly, the ALJ had no factual basis to support his classification of the No Participation in Claims provision as a Category 3 rule. Furthermore, the ALJ had no factual basis to support his finding that the No Participation in Claims provision would have an adverse impact on NLRA rights. Accordingly, there is no record evidence to support the ALJ's finding.

### **Exception #9**

The ALJ's finding that the No Participation in Claims provision "has the very 'predictable' impact of barring NLRA-protected conduct" (ALJ Dec. p. 3, Lines 35-36), as this finding is not supported by the record. At the hearing, the General Counsel presented no evidence regarding the potential impact the No Participation in Claims provision would have on employees' NLRA rights, as neither Camacho nor any former BUMC employee testified

regarding the potential impact the provision would have on their NLRA rights. Tr. 5:1-87:20. Furthermore, the General Counsel failed to present any evidence that any employee's NLRA rights were barred. Moreover, the record established that Camacho never executed the agreement, and was never bound by any of its terms. GC Ex. 2. Accordingly, there is no record evidence to support the ALJ's findings.

### **Exception #10**

The ALJ's finding that the No Participation in Claims provision is a "litigation ban" that "encompasses individuals, who might provide voluntary information to Board agents in further of ULP charges filed against Baylor" (ALJ Dec. p. 3, Lines 37-39), as this finding is not supported by the record.

Camacho's own actions directly contradict this finding by the ALJ that the No Participation in Claims provision would prevent former employees from providing voluntary information to the Board. Specifically, Camacho filed a Charge on March 3, 2017 (Case No. 16-CA-194387), approximately six months after being offered the Separation Agreement, alleging that she was terminated after making a complaint to the Company's Ethics Hotline. GC Ex. 1(g) at Exhibit D. On April 27, 2017, Acting Regional Director Timothy Watson dismissed the Charge on the grounds that there was "insufficient evidence to establish a violation of the Act" after a "careful investigation." GC Ex. 1(g) at Exhibit E. Camacho also filed a second charge (Case No. 16-CA-195335) on March 21, 2017, which is the subject of the ULP Hearing. Accordingly, the finding by the ALJ that the No Participation in Claims provision offered to Camacho would prevent her from voluntarily providing information to the Board for investigating ULP charges is belied by the fact that Camacho—in fact—voluntarily provided information to the Board for investigating at least two ULP charges, and the Regional Director

stated the Region conducted a “careful investigation” into the Charge (Case No. 16-CA-194387) based on the information Camacho provided before dismissing the charge. GC Ex. 1(g) at Exhibits D and E.

The General Counsel did not present any evidence on this issue to satisfy its burden. Thus, the ALJ had no record evidence to rely upon, and his findings and conclusions are incorrect.

#### **Exception #11**

The ALJ’s findings that “Baylor effectively failed to offer a legitimate rationale regarding why former employees cannot provide information to NLRB agents that is unrelated to their termination or might vindicate other valid NLRA interests” (ALJ Dec. p. 4, Lines 2-4), as these findings are not supported by the record and mischaracterize the plain language of the No Participation in Claims provision.

At the hearing, Lisa Smith gave credible and unrebutted testimony regarding BUMC’s business justifications for the alleged unlawful provisions. Tr. 28:1-83:10. Accordingly, the finding that “Baylor effectively failed to offer a legitimate rationale” for the No Participation in Claims provision directly contradicts the record evidence. Moreover, the General Counsel presented no evidence to support the finding that former employees would interpret the provision as a prohibition from providing “information to NLRB agents that is unrelated to their termination or might vindicate other valid NLRA interests,” as no former BUMC employees testified regarding their interpretation of the provision. Tr. 5:1-87:20.

#### **Exception #12**

The ALJ’s finding that “the balancing test . . . tips heavily in favor of finding that the severe impact of barring former workers from providing testimony to Board agents about alleged

labor relations heavily outweighs Baylor's mostly unsubstantiated justification for the rule" (ALJ Dec. p. 4, Lines 4-7), as this finding is not supported by the record or applicable Board precedent.

In analyzing whether the No Participation in Claims provision was lawful, the ALJ was required to balance the nature and extent of the potential impact on NLRA rights and BUMC's legitimate justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154, slip op. at 3 (December 14, 2017). This finding by the ALJ is based on pure speculation because the General Counsel presented no evidence regarding the potential impact the No Participation in Claims provision would have on employees' NLRA rights. Tr. 5:1-87:20. Accordingly, the ALJ erred in finding that the No Participation in Claims provision violated the Act. Additionally, Camacho, a former employee, participated in the Region's investigation of the Separation Agreement by filing a charge in this instant case. GC Ex. 1(a). The record evidence does not support the ALJ's findings.

### **Exception #13**

The ALJ's findings that the Confidentiality provision was unlawful (ALJ Dec. p. 2, Line 36, p. 4, Line 11, p. 5, Lines 8-10), as these finding are not supported by the record or applicable Board precedent.

In analyzing whether the Confidentiality provision was lawful, the ALJ was required to balance the nature and extent of the potential impact on NLRA rights and BUMC's legitimate justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154, slip op. at 3 (December 14, 2017). At the hearing, the General Counsel presented no evidence regarding the potential impact the Confidentiality provision would have on employees' NLRA rights. Tr. 5:1-87:20. Accordingly, there was no record evidence to support the ALJ's finding, and he erred in

concluding that the Confidentiality provision violated the Act. The ALJ further erred in not properly analyzing the evidence under the new *Boeing* standard.

#### **Exception #14**

The ALJ's classification of confidentiality rules and policies as "Category 3" rules "inasmuch as its adverse impact on NLRA-protected rights is not outweighed by any justification" and finding the Confidentiality provision "fits within Category 3, and is unlawful because its limitation on NLRA-protected conduct (e.g., wage and benefit discussions) is not outweighed by Baylor's reported justification" (ALJ Dec. p. 4, Lines 11-13 and 22-24), as these findings are not supported by the record or applicable Board law.

By categorizing confidentiality rules as Category 3 rules and policies, the ALJ effectively held that the Board believes that any and all employer confidentiality rules, policies, and provisions—and not just the Confidentiality provision in the Separation Agreement at issue in this case—are categorically unlawful to maintain. In *Boeing*, the Board held it "will delineate three categories of employment policies, rules and handbook provisions." *Boeing Company*, 365 NLRB No. 154, slip op. at 3 (December 14, 2017). It stated that "Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule" and "predictably [have] an adverse impact on Section 7 rights that outweighs any justifications." *Id.* The ALJ's classification of confidentiality rules and policies as Category 3's is contrary to Board precedent, as the Board has historically and consistently held that employers may lawfully maintain confidentiality provisions without violating the Act. *See Macy's, Inc.*, 365 NLRB No. 116, slip op. at \*4 (2017) ("the Board has repeatedly held that employees may be lawfully disciplined or discharged for using for organizational purposes information improperly obtained from their employer's private or

confidential records.”); *Asheville School, Inc.*, 347 NLRB 877, 881 (2006) (employee’s disclosure of wage information of other employees not protected since the employer “considered the . . . information to be confidential”); *Int’l Business Machines Corp.*, 265 NLRB 638, \*2 (1982) (employer’s confidentiality policy preventing the disclosure or distribution of wage data lawful because the employer had “established substantial and legitimate business justifications for its policy.”); *Bell Fed. Sav. & Loan Ass’n*, 214 NLRB 75, \*7 (1974) (switchboard operator’s disclosure to union regarding content of company executive’s telephone calls not protected activity because executive “had a right to rely on [the employee], or any other employee covering the switchboard, not to disclose information regarding his telephone calls, particularly those from his legal counsel.”).

Here, the Confidentiality provision did not prohibit discussions of wages or benefits between employees, as the example Category 3 provision in *Boeing* did. *Boeing Company*, 365 NLRB No. 154, at 4. Confidentiality provisions, therefore, cannot rightfully be considered Category 3 rules, and the ALJ erred by classifying them as such, since the Board has consistently found these provisions to be lawful. Accordingly, the ALJ’s analysis and incorrect categorization of confidentiality rules under *Boeing* contributed to the erroneous finding that the Confidentiality provision in this case was unlawful.

#### **Exception #15**

The ALJ’s finding that “[t]he Confidentiality provision would *reasonably be construed* by former employees to prohibit §7 activities by banning discussion of wages, hours, and working conditions with current employees, unions or others after their separation” (ALJ Dec. p. 4, Lines 13-15) (emphasis added), as the *Lutheran Heritage* “reasonably construe” standard has

been expressly overruled by the Board. *Boeing Company*, 365 NLRB No. 154, slip op. at 2 (December 14, 2017).

Prior to the Board's decision in *Boeing*, the test for determining whether an employer's work rule or policy violated section 8(a)(1) of the Act was whether "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage*, 343 NLRB 646, 646-47 (2004). However, the Board in *Boeing* "decided to overrule the *Lutheran Heritage* 'reasonably construe' standard," *Boeing Company*, 365 NLRB No. 154, at 2. Accordingly, the ALJ's use of the overruled *Lutheran Heritage* reasonably construe standard for evaluating the lawfulness of BUMC's Confidentiality provision was in legal error and resulted in the incorrect finding that the Confidentiality provision violated the Act. Moreover, notwithstanding the ALJ's application of the incorrect standard when analyzing the Confidentiality provision, the General Counsel presented no evidence regarding how former employees would construe the Confidentiality provision as no former employees testified regarding their interpretation of the provision at the hearing. Tr. 5:1-87:20. The ALJ should have used the new standard enunciated in *Boeing*: the balancing of "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing Company*, 365 NLRB No. 154, at 3. His failure to use the proper standard was legal error.

#### **Exception #16**

The ALJ's reliance on the cases of *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 7 (2015), *DirectTV U.S.*, 359 NLRB 545, 546-47 (2013), and *Cintas Corp.*, 344 NLRB 943, 943 (2005), for the proposition that "[t]he Board has held that comparable [confidentiality] rules have the predictive effect of limiting §7 discussion of wages, hours, and working conditions" (ALJ Dec. p. 4, Lines 15-19 (citing *Boeing*), n. 7), as these cases apply the—now

overturned—*Lutheran Heritage* “reasonably construe” standard. In fact, the *Boeing* decision expressly critiques the Board’s decisions in *Rocky Mountain Eye* and *Cintas Corp.* for “dispens[ing] with any consideration of the employer’s legitimate business purposes.” *Boeing Company*, 365 NLRB No. 154, slip op. at 13-14, n. 69 (December 14, 2017).

In *Boeing*, the Board explicitly overruled the *Lutheran Heritage* “reasonably construe” standard. *Id.* at 2 (“For the reasons set forth below, we have decided to overrule the *Lutheran Heritage* ‘reasonably construe’ standard.”). The ALJ’s reliance on cases that apply the overturned *Lutheran Heritage* standard was legal error and necessarily contributed to the incorrect finding that the Confidentiality provision in the Separation Agreement was unlawful.

#### **Exception #17**

The ALJ’s failure to properly consider BUMC’s “attempt[s] to justify its rule as a protection against former employees divulging private health-care related information” (ALJ Dec. p. 4, Lines 19-20), as this finding is supported by the record evidence and Board precedent.

Lisa Smith testified, and the General Counsel failed to rebut, BUMC’s business justifications for the Confidentiality provision. Specifically, Smith credibly testified that BUMC had the Confidentiality provision because (1) the exposure to confidential patient health care information that all BUMC employees have as a result of being employed at a health care institution (Tr. 75:16-76:7), (2) the harm that would result if this confidential patient information was released (Tr. 76:14-25), (3) Camacho’s exposure to BUMC’s confidential and proprietary information including program metrics, credit card and other personal information of physicians/customers, vendor information, the BUMC database, budget information, and special access to the certain files in the BUMC system. (Tr. 73:7-74:13). Smith also testified regarding the steps BUMC takes to protect this confidential information—further evidencing BUMC’s

legitimate business interests. Specifically, Smith testified that BUMC has a “culture of confidentiality” Tr. 77:10-11. To help maintain this culture, Smith testified BUMC requires all employees to have passwords to their computer systems, limits what employees have access to on the system depending on their roles, and requires all employees to attest to a confidentiality clause in the BUMC Code of Conduct. Tr. 74:15-75:4. The ALJ’s failure to properly consider all of the business justifications to which Smith testified, as well as the failure to give proper weight to this unrebutted testimony, necessarily resulted in the incorrect, and excepted to, finding that the Confidentiality provision was unlawful under *Boeing*.

Furthermore, the ALJ disregarded the Board’s rationale for overruling *Lutheran Heritage*. One of the specific reasons the Board overruled *Lutheran Heritage*’s reasonable construe test was because “the Board has not given sufficient consideration to unique characteristics of particular work settings and different industries.” *Boeing*, 365 NLRB No. 154, slip op. at 10. In *Boeing*, the Board noted that the Board and the courts have long recognized the importance of avoiding conflict and disruptions in an acute-care hospital setting. *Id.* at slip op. 11, n. 48. The *Boeing* Board further noted that in *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011), the Board majority upheld a hospital’s no-photography rule—notwithstanding its potential impact on Section 7 activity—after considering the “weighty” privacy interests of patients and the hospital’s “significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography.” *Id.* (citing *Flagstaff*, 357 NLRB at 663). Accordingly, the ALJ erred by ignoring the unique characteristics of the hospital setting and industry. The ALJ failed to analyze how the industry impacted the Confidentiality provision.

### **Exception #18**

The ALJ's findings that the Confidentiality provision "broadly encompasses wages and benefits" and "bans discussion of wages, hours, and working conditions with employees" (ALJ Dec. p. 4, Lines 20-21, p. 5 Lines 8-10), as these findings are not supported by the record. The Confidentiality provision in the Separation Agreement offered to Camacho does not directly or indirectly prohibit discussions between employees regarding wages, benefits, working conditions, or any other terms and conditions of employment, and never explicitly or implicitly refers to banning discussions of wages, hours, benefits, or working conditions. GC Ex. 2.

Furthermore, the ALJ failed to examine the Confidentiality provisions as a whole, as is required by Board precedent. *See, e.g., Dish Network, LLC*, 365 NLRB No. 47 (Apr. 13, 2017) ("Additionally, in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, and particular phrases may not be read in isolation.") (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)).

### **Exception #19**

The ALJ's failure to consider and give proper weight to the business justifications for the Confidentiality provision in the Separation Agreement (ALJ Dec. p. 4, Lines 11-24), as this failure contributed to the ALJ's incorrect finding that the Confidentiality provision violated the Act, and was a failure to apply the new *Boeing* standard.

In analyzing whether the Confidentiality provision was lawful, the ALJ was required to balance the nature and extent of the potential impact on NLRA rights and the legitimate justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154, slip op. at 3 (December 14, 2017). However, the ALJ failed to give proper weight to the unrebutted testimony of Lisa Smith regarding BUMC's business justifications for the provision and the steps the

Company takes to protect its confidential information. Specifically, Lisa Smith testified that (1) Camacho had knowledge of and access to BUMC's confidential and proprietary information, the disclosure of which would harm BUMC (Tr. 73:3-74:14), BUMC has a legal obligation to protect patient's confidential health information (Tr. 75:5-11), Camacho had knowledge of and access to confidential patient information (Tr. 75:16-76:7), BUMC protects its confidential and proprietary information by issuing employees passwords to computer systems, limiting employees access to information, maintaining and enforcing a code of conduct which contains a confidentiality agreement, and maintaining and enforcing company policies regarding confidentiality (Tr. 74:15-75:11), and Camacho had access to other proprietary and confidential information such as physician/customer credit card information, vendor information, and performance metrics of BUMC (Tr. 73:9-22). The ALJ's failure to give weight to Smith's unrebutted testimony regarding BUMC's business justifications associated with the provision resulted in a misapplication of the *Boeing* balancing test.

#### **Exception #20**

The ALJ's finding that an employer may violate the Act by offering or entering into a severance or separation agreement with a lawfully terminated employee (ALJ Dec. p. 4, Line 35-p. 5, Line 13), as this finding is contrary to Board precedent and policy.

The Board has a long standing policy promoting peaceful settlement of claims. *See Indep. Stave Co.*, 287 NLRB 740, 741 (1987) (The Board "has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them.") (citing *Combustion Engineering*, 272 NLRB 215 (1984); *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979)); *Texaco, Inc.*, 273 NLRB 1335, 1336-1337 (1985); *NLRB v. Food &*

*Commercial Workers Local 23* (No. 86-594, slip op. at 14, 1987) (“Congress was aware that settlements constitute the life blood of the administrative process, especially in labor relations.”). Offering or entering into severance or separation agreements with lawfully terminated former employees furthers the Board’s goal of promoting peaceful resolution of disputes, and to the extent not already permitted under applicable Board law and precedent, the legality of confidential severance or separation agreements for former employees should be reconsidered by the Board.

### **Exception #21**

The ALJ’s finding that Camacho was an employee under the Act (ALJ Dec. p. 5, n. 8), as this finding is not supported by the record or Board precedent.

The Supreme Court has held that the term employee should be narrowly interpreted, stating that “the legislative history of § 2(3) itself indicates that the term ‘employee’ is not to be stretched beyond its plain meaning embracing *only those who work for another for hire.*” *Allied Chem. v. Pittsburgh Plate*, 404 U.S. 157, 166 (1971) (emphasis added); *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999) (unpaid staff are not employees under the Act); *Toering Electric Co.*, 351 NLRB 225 (2007) (job applicants are not employees within the meaning of Section 2(3)); *Brevard Achievement Center*, 342 NLRB 982 (2004) (disabled workers having a primarily rehabilitative relationship with their employer are not statutory employees). It is undisputed that at the time Camacho was offered the Agreement, she was no longer employed by BUMC. Tr. 31:20-22; 68:20-22; GC Ex. 2. The other persons who executed the Workforce Realignment were also former employees. Tr. 17:1-11; GC Ex. 3. Accordingly, as a former employee, Camacho, and the other employees, do not qualify as statutory employees under Section 2(3) of the Act.

The case cited by the ALJ for his finding is also readily distinguishable from the facts in this case, as the former employee at issue in *Little Rock Crate & Basket* was terminated just moments before the alleged Section 7 interference by the employer and was distributing union literature at the time of the alleged unfair labor practice. 227 NLRB 1406, 1406 (1977). The Agreement was offered to Camacho after she was no longer a statutory employee of BUMC, and thus the ALJ erred in finding that the Company violated the Act by offering her the Separation Agreement with the alleged unlawful provisions. The ALJ also erred by finding former employee Camacho, and the other terminated employees, are statutory employees under Section 2(3) of the Act.

#### **Exception #22**

The ALJ's remedy (ALJ Dec. p. 5, Lines 17-21), as this remedy is not supported by the record or applicable Board law. The ALJ's remedy is based on the incorrect—and excepted to—findings that the No Participation in Claims and Confidentiality provisions are unlawful under the Board's new *Boeing* standard. Moreover, the remedy is also based on the ALJ's admission into evidence of 23 Workforce Realignment Agreement and General Releases that were not properly authenticated under Board law. Tr. 63:9-65:6; see *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1241 (2004) ("Fed. R. Evid. 901 requires that evidence be authenticated as a condition precedent to admissibility."); Fed. R. Evid. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."); 29 U.S.C. Section 160(b) (unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .").

### **Exception #23**

The ALJ's order (ALJ Dec. p. 5, Line 28 – p. 6, Line 29), as this order is not supported by the record or applicable Board law. The ALJ's order is based on the incorrect—and excepted to—findings that the No Participation in Claims and Confidentiality provisions are unlawful under the Board's new *Boeing* standard. Moreover, the remedy is also based on the ALJ's admission into evidence of 23 Workforce Realignment Agreement and General Releases which were not properly authenticated under Board law. Tr. 63:9-65:6; *see Washington Fruit & Produce Co.*, 343 NLRB 1215, 1241 (2004) (“Fed. R. Evid. 901 requires that evidence be authenticated as a condition precedent to admissibility.”); Fed. R. Evid. 901 (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”); 29 U.S.C. Section 160(b) (unfair labor practice proceedings “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .”).

### **Exception #24**

The ALJ's failure to find that the allegations in the General Counsel's Amended Complaint are not closely related to the allegations in Camacho's Charge, (ALJ Dec. p. 1-6), as this finding was supported by the record and applicable Board law.

The allegations made by the General Counsel in its Amended Complaint (GC Ex. 1(i) at ¶¶ 7-8) are not closely related to the allegations in Camacho's Charge, and therefore were untimely under 10(b) of the Act and should have been dismissed by the ALJ. Board law “is well settled that in order to be adequately supported by the underlying charge, a complaint allegation must be ‘factually related’ to the allegations in the charge itself. When making such a

determination, the Board considers whether the complaint allegations involve the same legal theory and arise from the same factual circumstances or sequence of events as the charge, and whether a respondent would raise similar defenses to both sets of allegations.” *CVS Rx Servs., Inc.*, 363 NLRB No. 180, slip op. at 16 (May 4, 2016). The Board has specifically held that events do not arise from the same set of facts where the event alleged in the timely filed charge was limited to a few employees, and the later alleged-event affected an entire class of employees. *Ajioma Lumber, Inc.*, 345 NLRB No. 19, slip op. at 3 (2005). The General Counsel did not present any evidence regarding the factual circumstances surrounding the other former employees. It was legal error for the ALJ to conclude that the allegations are closely related because the General Counsel failed to present any evidence regarding who the facts were factually related.

Here, it cannot be said that the allegations in the Amended Complaint are factually related to the allegations in the Charge since (1) the allegation in the Charge is that BUMC violated the Act by merely “maintaining” the agreements, while the Amended Complaint alleges a violation occurred because it “issued” the agreements to employees, (2) the time periods which the alleged violations occurred are different, and (3) the Charge was only brought by Camacho, whereas the Amended Complaint alleges BUMC violated Section 7 rights of an unspecified amount of unnamed employees. *See* GC Ex. 1(a); GC Ex. 1(i). Accordingly, the ALJ erred in its failure to dismiss the allegations in the Amended Complaint as untimely.

#### **Exception #25**

The ALJ’s failure to make any credibility determinations or resolutions in favor of BUMC employee Lisa Smith (ALJ Dec. p 1-6), as this finding was supported by the record evidence. Smith was subpoenaed by the General Counsel and was the only witness the General

Counsel and Respondent called to testify. Smith gave straightforward, credible testimony that was supported by the evidence and unrebutted by the General Counsel. Tr. 28:1-83:10. This failure by the ALJ to credit Smith's testimony runs counter to the favorable treatment unrebutted testimony typically receives. *See, e.g., Am. Sales & Mgmt. Org., LLC*, 2018 WL 683825 (Jan. 30, 2018) (“[T]he Respondent's failure to call them leads to an adverse inference that their testimony would not have been favorable to the Respondent, and I credit the unrebutted accounts of witnesses who testified about incidents in which those individuals participated.”).

### **Exception #26**

The ALJ's failure to draw an adverse inference against the General Counsel because of its failure to produce testimony that Camacho either read or had knowledge of the alleged unlawful provisions in the Separation Agreement (ALJ Dec. p. 1-6), as this finding is supported by the record evidence and applicable Board law.

A party's failure to produce testimony on an issue which it has the burden of proof warrants an inference that any testimony elicited by that party on that particular issue would be adverse. *See e.g., Kbms, Inc.*, 278 NLRB 826, 848-49 (1986) (“[I]t is generally recognized that the inference is drawn against the party with the burden of persuasion on an issue . . .”). Board precedent indicates that an employee must have knowledge of the alleged unlawful rule or policy for an 8(a)(1) violation to occur. *See Metro Networks, Inc.*, 336 NLRB 63, 65 (“[Employer] did not unlawfully offer [the employee] the severance agreement because it neither showed her the severance agreement nor told her about the nonassistance and nondisclosure provisions in pars. 6 and 8.”). Despite the fact that Camacho was present at the hearing, the General Counsel failed to call Camacho to testify whether she had knowledge of the alleged unlawful provisions in the Separation Agreement. Tr. 5:1-87:20. Accordingly, the General Counsel failed to produce any

evidence or testimony to meet its burden that Camacho ever read or had knowledge of the alleged unlawful provisions in the Separation Agreement, and thus an adverse inference should have been drawn against the General Counsel on this point.

**Exception #27**

The ALJ's failure to draw an adverse inference against the General Counsel because of its failure to produce testimony from Camacho, or any former BUMC employee, regarding the nature and extent of the potential impact the alleged unlawful provisions would have on the former employees' NLRA rights (ALJ Dec. p. 1-6), as this finding is supported by the record evidence and applicable Board law.

A party's failure to produce testimony on an issue which it has the burden of proof warrants an inference that any testimony elicited by that party on that particular issue would be adverse. *See e.g., Kbms, Inc.*, 278 NLRB at 848-49 (“[I]t is generally recognized that the inference is drawn against the party with the burden of persuasion on an issue . . . .”). The General Counsel had the burden to prove the nature and extent of the potential impact the alleged unlawful provisions would have on NLRA rights outweighs BUMC's legitimate justifications associated with the provisions. *Boeing Company*, 365 NLRB No. 154, slip op. at 14 (December 14, 2017). Despite this burden, the General Counsel presented no evidence regarding the nature and extent of the potential impact that the provisions would have on NLRA rights. Tr. 5:1-87:20. The General Counsel could have called Camacho (who was in attendance at the ULP Hearing) to testify regarding her interpretation of the provisions and the impact it would have on her ability to engage in protected activity—but did not do so. Tr. 5:1-87:20. Accordingly, the General Counsel failed to produce any evidence or testimony to meet its burden that the alleged unlawful

provisions would have any potential impact on employees' NLRA rights, and thus an adverse inference should have been drawn by the ALJ.

### **Exception #28**

The ALJ's denial of Respondent's Petition to Revoke Subpoena Duces Tecum B-1-YUD6DZ with regards to requests 7 and 8 (Tr. 16:2-5), as this finding was not supported by applicable Board precedent.

On November 2, 2017, the Region issued Subpoena Duces Tecum B-1-YUD6DZ containing 8 requests. GC Ex. 4. On November 9, 2017, Respondent filed its Petition to Revoke Subpoena Duces Tecum B-1-YUD6DZ (R. Ex. 1), objecting to many of the requests in the Subpoena. Counsel for the General Counsel and Counsel for Respondent were able to resolve all issues with the subpoena other than with regard to requests 7 and 8 prior to the hearing. Tr. 14:5-9. Request 7 sought, in relevant part, "a list of all employees who have entered into severance agreements with [BUMC]", and request 8 sought "[c]opies of all of the severance agreements referenced in [Request No.] 7." In its Petition to Revoke (R. Ex. 1) and again at the hearing (Tr. 15:22-16:5), Respondent objected to the requests on the grounds they sought documents not relevant to the proceedings. R. Ex. 1. Specifically, Respondent objected to the requests since they sought documents related to employees whose claims were time barred since the allegations related to their claims raised in the Amended Complaint were not closely related to the allegations in the Charge. R. Ex. 1; *see also* Exception #24. Accordingly, the ALJ erred in his denying Respondent's Petition to Revoke during the hearing. Tr. 16:2-5.

Respectfully submitted this 12th day of March, 2018.

HUNTON & WILLIAMS LLP

/s/ Amber M. Rogers

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Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify that on the 12th day of March, 2018, I caused Respondent's Exceptions to the Administrative Law Judge's Decision and Argument in Support of Exceptions to be electronically filed with the National Labor Relations Board at <http://nlr.gov> and a copy of same to be served on the following parties of record via e-mail:

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